

**ASSEMBLY BILL**

**No. 2993**

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**Introduced by Assembly Member Plescia**

February 22, 2008

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An act to add and repeal Section 21568 of the Public Contract Code, relating to design-build.

LEGISLATIVE COUNSEL'S DIGEST

AB 2993, as introduced, Plescia. Design-build: metropolitan water districts: renewable energy.

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement.

This bill would authorize a Metropolitan Water District, with the approval of its board of directors, to enter into design-build contracts, as defined, for the design, construction, fabrication, and installation of renewable energy projects, in accordance with specified provisions.

The bill would require specified information to be verified under oath, thus imposing a state-mandated local program by expanding the scope of an existing crime.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

This bill would specify that these provisions are repealed on January 1, 2019, unless a later enacted statute deletes or extends that date.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 21568 is added to the Public Contract  
2     Code, to read:  
3     21568. (a) (1) It is the intent of the Legislature to enable the  
4     public agencies to utilize cost-effective options for building and  
5     modernizing public facilities. The Legislature also recognizes the  
6     national trend, including authorization in California, to allow public  
7     entities to utilize design-build contracts as a project delivery  
8     method for specified types of projects.  
9     (2) The Legislature also finds and declares that utilizing a  
10    design-build contract requires a clear understanding of the roles  
11    and responsibilities of each participant in the design-build process.  
12    The Legislature also finds that the cost-effective benefits to public  
13    agencies are achieved by shifting the liability and risk for cost  
14    containment and project completion to the design-build entity.  
15    (3) It is the intent of the Legislature to provide an alternative  
16    and optional procedure for bidding and building certain renewable  
17    energy projects for the district.  
18    (b) (1) A metropolitan water district incorporated under the  
19    Metropolitan Water District Act, with approval of its board of  
20    directors, may utilize an alternative procedure to competitive  
21    bidding for capital projects, including the procurement of  
22    contractor-supplied equipment in excess of three million dollars  
23    (\$3,000,000) for the design, construction, fabrication, and  
24    installation of renewable energy projects, including, but not limited  
25    to, solar energy generation systems (e.g., photovoltaics).  
26    (2) A district may award the project using the lowest responsible  
27    bidder or by best value.  
28    (3) The design-build or best value approaches may be used for  
29    renewable energy projects when it is anticipated that it will reduce  
30    project cost, expedite project completion, or provide design features  
31    not achievable through the design-bid-build method.  
32    (4) If a district elects to proceed under this section, the district  
33    shall establish and enforce, for design-build projects, a labor  
34    compliance program containing the requirements outlined in  
35    Section 1771.5 of the Labor Code, or it shall contract with a third

1 party to operate a labor compliance program containing the  
2 requirements outlined in Section 1771.5 of the Labor Code. This  
3 requirement shall not apply to any project where the district or the  
4 design-build entity has entered into any collective bargaining  
5 agreement or agreements that bind all of the contractors performing  
6 work on the project.

7 (c) As used in this section:

8 (1) “Best value” means a value determined by objective criteria  
9 relative to price, features, functions, and life-cycle costs, including,  
10 but not limited to, operation, repair, and replacement.

11 (2) “Design-build” means a procurement process in which both  
12 the design and construction of a project are procured from a single  
13 entity.

14 (3) “Design-build entity” means a partnership, corporation, or  
15 other legal entity that is able to provide appropriately licensed  
16 contracting, architectural, and engineering services as needed  
17 pursuant to a design-build contract.

18 (4) “District” means a metropolitan water district incorporated  
19 under the Metropolitan Water District Act.

20 (5) “Project” means the design, construction, fabrication, and  
21 installation of a renewable energy system, including such ancillary  
22 improvements directly related to the renewable energy system.

23 (d) Design-build projects shall progress in a four-step process,  
24 as follows:

25 (1) (A) The district shall prepare a set of documents setting  
26 forth the scope of the project. The documents may include, but are  
27 not limited to, the size, type, and desired generation capacity of  
28 the energy system; performance specifications covering the quality  
29 and useful life of materials, equipment, and workmanship;  
30 preliminary plans or layouts; or other information deemed  
31 necessary to describe adequately the district’s needs. The  
32 performance specifications and any plans shall be prepared by a  
33 design professional who is duly licensed and registered in  
34 California.

35 (B) Any architect or engineer retained by the district to assist  
36 in the development of any preaward project-specific documents  
37 shall not be eligible to participate in the preparation of a bid with  
38 any design-build entity for that project.

39 (2) (A) Based on the documents prepared in paragraph (1), the  
40 district shall prepare a request for proposal that invites interested

1 parties to submit competitive sealed proposals in the manner  
2 prescribed by the district. The request for proposal shall include,  
3 but is not limited to, the following elements:

4 (i) Identification of the basic scope and needs of the project or  
5 contract, the expected cost range, and other information deemed  
6 necessary by the district to inform interested parties of the  
7 contracting opportunity, and the methodology that will be used by  
8 the district to evaluate proposals and specifically if the contract  
9 will be awarded to the lowest responsible bidder.

10 (ii) Significant factors that the district reasonably expects to  
11 consider in evaluating proposals, including cost or price and all  
12 nonprice-related factors.

13 (iii) The relative importance of weight assigned to each of the  
14 factors identified in the request for proposal.

15 (B) With respect to clause (iii) of subparagraph (A), if a  
16 nonweighted system is used, the district shall specifically disclose  
17 whether all evaluation factors other than cost or price, when  
18 combined, are:

19 (i) Significantly more important than cost or price.

20 (ii) Approximately equal in importance to cost or price.

21 (iii) Significantly less important than cost or price.

22 (C) If the district chooses to reserve the right to hold discussions  
23 or negotiations with responsive bidders, it shall so specify in the  
24 request for proposal and shall publish separately or incorporate  
25 into the request for proposal applicable rules and procedures to be  
26 observed by the district to ensure that any discussions or  
27 negotiations are conducted in good faith.

28 (3) (A) The district shall establish a procedure to prequalify  
29 design-build entities using a standard questionnaire developed by  
30 the district. In preparing the questionnaire, the district shall consult  
31 with the construction industry, including representatives of the  
32 building trades and surety industry. This questionnaire shall require  
33 information relative to the design-build entity and any general or  
34 limited partner, joint venturer, or other entity that is a part of the  
35 design-build entity (member entity), including, but not limited to,  
36 all of the following:

37 (i) If the design-build entity is a partnership, limited partnership,  
38 or other association, a listing of all of the partners, general partners,  
39 or association members known at the time of bid submission who

1 will participate in the design-build contract, including, but not  
2 limited to, mechanical subcontractors.

3 (ii) Evidence that the members of the design-build entity have  
4 completed or demonstrated the experience, competency, capability,  
5 and capacity to complete projects of similar type, size, scope, or  
6 complexity, and that proposed key personnel have sufficient  
7 experience and training to competently manage and complete the  
8 design and construction of the project, as well as a financial  
9 statement that assures the district that the design-build entity has  
10 the capacity to complete the project.

11 (iii) The licenses, registration, and credentials required to design  
12 and construct the project, including information on the revocation  
13 or suspension of any license, credential, or registration.

14 (iv) Evidence that establishes that the design-build entity has  
15 the capacity to obtain all required payment and performance  
16 bonding, liability insurance, and errors and omissions insurance.

17 (v) Any prior serious or willful violation of the California  
18 Occupational Safety and Health Act of 1973, contained in Part 1  
19 (commencing with Section 6300) of Division 5 of the Labor Code,  
20 or the federal Occupational Safety and Health Act of 1970 (P.L.  
21 91-596), settled against the design-build entity or any member of  
22 the design-build entity, and information concerning workers'  
23 compensation experience history and worker safety program.

24 (vi) Information concerning any debarment, disqualification,  
25 or removal from a federal, state, or local government public works  
26 project. Any instance where the design-build entity or any member  
27 entity, its owners, officers, or managing employees submitted a  
28 bid on a public works project and were found to be nonresponsive,  
29 or were found by an awarding body not to be a responsible bidder.

30 (vii) Any instance where the design-build entity or any member  
31 entity, or its owners, officers, or managing employees, defaulted  
32 on a construction contract.

33 (viii) Any violations of the Contractors' State License Law  
34 (Chapter 9 (commencing with Section 7000) of Division 3 of the  
35 Business and Professions Code), excluding alleged violations of  
36 federal or state law including the payment of wages, benefits,  
37 apprenticeship requirements, or personal income tax withholding,  
38 or of Federal Insurance Contributions Act (FICA; 26 U.S.C. Sec.  
39 3101 et seq.) withholding requirements settled against any member  
40 of the design-build entity.

1 (ix) Information concerning the bankruptcy or receivership of  
2 any member of the design-build entity, including information  
3 concerning any work completed by a surety.

4 (x) Information concerning all settled adverse claims, disputes,  
5 or lawsuits between the owner of a public works project and the  
6 design-build entity or any member of the design-build entity during  
7 the five years preceding submission of a bid pursuant to this  
8 section, in which the claim, settlement, or judgment exceeds fifty  
9 thousand dollars (\$50,000). Information shall also be provided  
10 concerning any work completed by a surety during this period.

11 (xi) In the case of a partnership or other association that is not  
12 a legal entity, a copy of the agreement creating the partnership or  
13 association and specifying that all partners or association members  
14 agree to be fully liable for the performance under the design-build  
15 contract.

16 (B) The information required pursuant to this subdivision shall  
17 be verified under oath by the entity and its members in the manner  
18 in which civil pleadings in civil actions are verified. Information  
19 that is not a public record pursuant to the California Public Records  
20 Act (Chapter 3.5 (commencing with Section 6250) of Division 7  
21 of Title 1 of the Government Code) shall not be open to public  
22 inspection.

23 (4) The district shall establish a procedure for final selection of  
24 the design-build entity and expressly provide that the district retains  
25 the right in its sole discretion with no liability to any entity to reject  
26 any and all proposals. Selection shall be based on either of the  
27 following criteria:

28 (A) A competitive bidding process resulting in lump-sum bids  
29 by the prequalified design-build entities. Awards shall be made to  
30 the lowest responsible bidder.

31 (B) The district may use a design-build competition based upon  
32 best value and other criteria set forth in paragraph (2). The  
33 design-build competition shall include the following elements:

34 (i) Competitive proposals shall be evaluated by using only the  
35 criteria and selection procedures specifically identified in the  
36 request for proposal. However, the following minimum factors  
37 shall each represent at least 10 percent of the total weight of  
38 consideration given to all criteria factors: price; technical design  
39 and construction expertise; life-cycle costs over 15 years or more;

1 skilled labor force availability; and acceptable safety record. Each  
2 of these factors shall be weighted equally.

3 (ii) Once the evaluation is complete, the top three responsive  
4 bidders shall be ranked sequentially from the most advantageous  
5 to the least.

6 (iii) The award of the contract shall be made to the responsible  
7 bidder whose proposal is determined based upon an objective  
8 application of the criteria in the request for proposal, to be the most  
9 advantageous.

10 (iv) Notwithstanding any provision of this code, upon issuance  
11 of a contract award, the district shall publicly announce its award,  
12 identifying the contractor to whom the award is made, along with  
13 a written decision stating the basis for the award. The notice of  
14 award shall also include the district's second and third ranked  
15 design-build entities.

16 (v) For the purposes of this paragraph, "skilled labor force  
17 availability" shall be determined by the existence of an agreement  
18 with a registered apprenticeship program, approved by the  
19 California Apprenticeship Council, which has graduated  
20 apprentices in each of the preceding five years. This graduation  
21 requirement shall not apply to programs providing apprenticeship  
22 training for any craft that has been deemed by the Department of  
23 Labor and the Department of Industrial Relations to be an  
24 apprenticeable craft in the five years prior to enactment of this act.

25 (vi) For the purposes of this paragraph, a bidder's safety record  
26 shall be deemed acceptable if its experience modification rate for  
27 the most recent three-year period is an average of 1.00 or less, and  
28 its average total recordable injury or illness rate and average lost  
29 work rate for the most recent three-year period does not exceed  
30 the applicable statistical standards for its business category, or if  
31 the bidder is a party to an alternative dispute resolution system as  
32 provided for in Section 3201.5 of the Labor Code.

33 (e) (1) Any design-build entity that is selected to design and  
34 build a project pursuant to this section shall possess or obtain  
35 sufficient bonding to cover the contract amount for nondesign  
36 services, and errors and omissions insurance coverage sufficient  
37 to cover all design and architectural services provided in the  
38 contract. This section does not prohibit a general or engineering  
39 contractor from being designated the lead entity on a design-build

1 entity for the purposes of purchasing necessary bonding to cover  
2 the activities of the design-build entity.

3 (2) Any payment or performance bond written for the purposes  
4 of this section shall be written using a bond form developed by  
5 the district.

6 (f) All subcontractors that were not listed by the design-build  
7 entity in accordance with clause (i) of subparagraph (A) of  
8 paragraph (3) of subdivision (d) shall be awarded by the  
9 design-build entity in accordance with the design-build process  
10 set forth by the district in the design-build package. All  
11 subcontractors bidding on contracts pursuant to this section shall  
12 be afforded the protections contained in Chapter 4 (commencing  
13 with Section 4100) of Part 1. The design-build entity shall do both  
14 of the following:

15 (1) Provide public notice of the availability of work to be  
16 subcontracted in accordance with the publication requirements  
17 applicable to the competitive bidding process of the district.

18 (2) Provide a fixed date and time on which the subcontracted  
19 work will be awarded in accordance with the procedure established  
20 pursuant to this section.

21 (g) The minimum performance criteria and design standards  
22 established pursuant to paragraph (1) of subdivision (d) shall be  
23 adhered to by the design-build entity. Any deviations from those  
24 standards may be allowed only by written consent of the district.

25 (h) The district may retain the services of a design professional  
26 or construction project manager, or both, throughout the course of  
27 the project in order to ensure compliance with this section.

28 (i) Contracts awarded pursuant to this section shall be valid until  
29 the project is completed.

30 (j) Nothing in this section is intended to affect, expand, alter,  
31 or limit any rights or remedies otherwise available at law.

32 (k) (1) If the district elects to award a project pursuant to this  
33 section, retention proceeds withheld by the district from the  
34 design-build entity shall not exceed 5 percent if a performance and  
35 payment bond, issued by an admitted surety insurer, is required in  
36 the solicitation of bids.

37 (2) In a contract between the design-build entity and the  
38 subcontractor, and in a contract between a subcontractor and any  
39 subcontractor thereunder, the percentage of the retention proceeds  
40 withheld may not exceed the percentage specified in the contract



1 between the district and the design-build entity. If the design-build  
2 entity provides written notice to any subcontractor that is not a  
3 member of the design-build entity, prior to or at the time the bid  
4 is requested, that a bond may be required and the subcontractor  
5 subsequently is unable or refuses to furnish a bond to the  
6 design-build entity, then the design-build entity may withhold  
7 retention proceeds in excess of the percentage specified in the  
8 contract between the district and the design-build entity from any  
9 payment made by the design-build entity to the subcontractor.

10 (l) If the district elects to proceed under this section and uses  
11 the design-build method on a public works project, it shall submit  
12 to the Legislative Analyst's Office before December 1, 2014, a  
13 report containing a description of each public works project  
14 procured through the design-build process that is completed after  
15 January 1, 2011, and before November 1, 2014. The report shall  
16 include, but shall not be limited to, all of the following information:

- 17 (1) The type of project.
- 18 (2) The gross square footage of the project.
- 19 (3) The design-build entity that was awarded the project.
- 20 (4) The estimated and actual project costs.
- 21 (5) A description of any written protests concerning any aspect  
22 of the solicitation, bid, proposal, or award of the design-build  
23 project, including the resolution of the protests.
- 24 (6) An assessment of the prequalification process and criteria.
- 25 (7) An assessment of the effect of retaining 5 percent retention  
26 on the project.
- 27 (8) A description of the Labor Force Compliance Program and  
28 an assessment of the project impact, where required.
- 29 (9) A description of the method used to award the contract. If  
30 the best value method was used, the report shall describe the factors  
31 used to evaluate the bid, including the weighting of each factor  
32 and an assessment of the effectiveness of the methodology.
- 33 (10) An assessment of the project impact of "skilled labor force  
34 availability."
- 35 (11) An assessment of the most appropriate uses for the  
36 design-build approach.

37 (m) Any district that elects not to use the authority granted by  
38 this section may submit a report to the Legislative Analyst's Office  
39 explaining why the district elected not to use the design-build  
40 method.

1 (n) On or before January 1, 2014, the Legislative Analyst's  
2 Office shall report to the Legislature on the use of the design-build  
3 method by the district pursuant to this section, including the  
4 information listed in subdivision (l). The report may include  
5 recommendations for modifying or extending this section.

6 (o) Except as provided in this section, nothing in this act shall  
7 be construed to affect the application of any other law.

8 (p) This section shall remain in effect only until January 1, 2019,  
9 and as of that date is repealed, unless a later enacted statute, that  
10 is enacted before January 1, 2019, deletes or extends that date.

11 SEC. 2. No reimbursement is required by this act pursuant to  
12 Section 6 of Article XIII B of the California Constitution because  
13 the only costs that may be incurred by a local agency or school  
14 district will be incurred because this act creates a new crime or  
15 infraction, eliminates a crime or infraction, or changes the penalty  
16 for a crime or infraction, within the meaning of Section 17556 of  
17 the Government Code, or changes the definition of a crime within  
18 the meaning of Section 6 of Article XIII B of the California  
19 Constitution.